IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 9240

B. C. SCHRAM, Receiver of First National Bank-Detroit,
a National Banking Association,
Appellant,
vs.
BERTHA H. ROBERTSON,
Appellee

PETITION OF APPELLANT FOR REHEARING

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To the United States Circuit Court of Appeals for the Ninth Circuit and Judges Thereof:

B. C. Schram, Receiver of First National Bank-Detroit, an insolvent national banking association, appellant in the above cause, considering himself aggrieved by the decision and judgment of this Court rendered herein on April 30, 1940, respectfully prays for a rehearing and for ground thereof states:

1. The reasoning of the opinion of this Court, filed April 30, 1940, logically requires a reversal instead of an affirmance of the judgment below. This Court holds in the opinion as follows, by Denman, J.:

> "This suit was brought within the four-year California limitation on suits on written contracts (*Cal. Code of Civ. Proc.* Sec. 337), that time beginning to run in California *(Cal. Code of Civ. Proc.* Sec. 351) upon Robertson commencing a residence there about six months before the filing of Schram's bill. It was filed within the statutory limitations of Michigan."

The Court then reaffirms the prior holding in *Schram v. Poole,* 97 F. (2d) 566; *Schram v. Smith,* 97 F. (2d) 662 and *Schram v. Leyda,* 97 F. (2nd) 665, "that Article IX-A created a contractual liability to pay the assessment, different in origin and separate in character from the direct liability of a national bank stockholder." However, the Court holds that the prior decisions were "confined to the mere *existence* of a separate contract," and states that "here, for the first time, is considered the terms of the contract as shortening the time within which a suit otherwise might be brought." This Court then holds that the terms of the contract provide that the extent of time within which suit may be brought on the contract liability is the same as the time permitted by the law of the state in which suit is brought in cases where direct statutory liability is asserted.

Our point is that, accepting the decision of this Court in full, the Court has held that there is a separate contractual liability measured in amount and extent by the terms of the contract. That being so, in view of Robertson having moved into California from Michigan, the statutory liability of three years did not begin to run until she entered the State. Sec. 351, *California Code of Civil Procedure,* provides:

> "If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, * * *"

California interprets this section as tolling "the statute against a non-resident who has never been in the state. 'Returned' is equivalent to 'entered.'" *Irving Nat. Bank v. Law* (C. C. A. 2, 1926), 10 F. (2d) 721, 722; *Foster v. Butler,* 164 Cal. 623, 130 P. 6; *Dougall v. Schulenberg,* 101 Cal. 154, 35 P. 635; *McKee v. Dodd,* 152 Cal. 637, 93 P. 854.

Section 359 provides:

> "This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce liability created by law; but such action must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created."

Section 361 provides:

> "When a cause of action has arisen in another state * * * and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state * * *."

It is admitted that the cause of action asserted against Robertson arose in Michigan. It is admitted and stated in the opinion that this suit "was filed within the statutory limitations of Michigan."

The single question is whether Sec. 351 providing an exception which tolls the beginning of the three year statute of limitations in the case of a non-resident is made inapplicable in the present case by Sec. 359, which states that Sec. 351 shall not affect actions against stockholders "to enforce liability created by law."

The answer which we submit is compelled by the opinion in this Robertson case, and the prior opinions of this Court, is that the liability sought to be enforced against Robertson is imposed or created by contract, but the contract limits the time within which suit must be commenced to the period of three years for statutory liabilities. Since we are seeking in the Robertson case to enforce *a liability created by contract* (which contract this Court holds provides for the state period of limitations), Section 351 applies. If we were suing solely to enforce a statutory liability created by law, and not a contract liability, Section 351 would not apply by reason of the specific terms of Sec. 359.

The facts in the Robertson case are peculiar to that case and bring it directly under Sec. 351. Robertson was not a resident of California. She was a resident of Michigan. Her contract liability was created in and arose under the laws of the State of Michigan. Under such laws the receiver had six years within which to enforce the contract embodied in Article IX-A. At the end of four years Robertson left Michigan and sought refuge in California. Under the laws of California her contract liability did not accrue until she entered the State, as provided by Sec. 351. Schram sued her within six months, which was well within the three-year period allowed by the laws of California to enforce statutory liabilities, which was the period of limitations which the Court holds was adopted by the "terms of the contract shortening the time within which a suit otherwise might be brought." In other words, the question, which was not argued orally and is not considered in the opinion, relates to the time when the three-year period begins to run under Sec. 351, which is directly applicable to the facts of the Robertson case and is not made inapplicable by Sec. 359 because the liability of Robertson was created by her contract, as this Court holds.

We, therefore, respectfully request a rehearing in the case at bar, and submit that without changing the reasoning, logic or language of the opinion of the Court, but applying said reasoning to the facts of this case and the language of Sec. 359, it must be held that the Robertson action was commenced in time under Sec. 351. Any other holding would require this Court to deny to the receiver the consequences of its holding that the liability of Article IX-A is a liability created by contract, and would require the Court to deny the benefits of Section 351 to the Receiver. Any other construction would require the Court to find that the statute of limitations had already run before Robertson entered California and that no effect whatsoever is to be given to the liability created by her contract under Article IX-A.

We, therefore, urge this Court to reverse the judgment in the Robertson case on the ground that the action, insofar as it sought to recover under Article IX-A for a liability created by contract, was brought in time and at the earliest possible moment that it could have been brought under the law of California, and that the time for commencing such action against a non-resident is tolled by Section 351 which is not made inapplicable under the peculiar facts of this case by Sec. 359.

Respectfully submitted,

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ROBERT S. MARX,
Of Counsel,
Detroit, Michigan.

We do hereby certify that, in our judgment as counsel herein, the ground of the foregoing petition for rehearing is well founded, that this said petition is proper to be presented and filed, and do further certify that this said petition is not interposed for delay.

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JARVIS R. WILDER,
Counsel for Appellant.

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ROBERT S. MARX,
Of Counsel.